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SIPDIS

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TAGS: [PREL](#) [MARR](#) [MOPS](#) [PARM](#) [PGOV](#) [GM](#)
SUBJECT: SEPTEMBER 17 VISIT OF ACTING DOD GENERAL COUNSEL
TO BERLIN

REF: A. BERLIN 01204
[1](#)B. GENEVA 00763

Classified By: CHARGE D'AFFAIRES JOHN KOENIG. REASONS: 1.4 (B) AND (D).

[1](#)1. (C) SUMMARY: Acting DOD General Counsel Daniel Dell'Orto, accompanied by Charge Koenig, met with MFA Legal Advisor Georg Witschel and MOD Legal Advisor Dieter Weingartner September 17 in Berlin. In addition to a general legal discussion about the use of force in combating transnational terrorism and detention of enemy combatants, four issues dominated the meeting agenda: 1) SOFA status for non-DOD USG civilians working at U.S. military commands in Germany, 2) the legal basis for military units from non-NATO or non-PfP countries to train at U.S. military bases in Germany, 3) possible contradictions between the Oslo Convention and the draft protocol on cluster munitions being negotiated under the framework of the Convention on Certain Conventional Weapons (CCW), and 4) sovereign immunity for DOD-chartered vessels at German ports. END SUMMARY.

SOFA STATUS FOR NON-DOD USG CIVILIANS

[1](#)2. (C) MFA Legal Advisor Georg Witschel confirmed that the German government strongly supported the U.S. decision to temporarily base the headquarters of the new Africa Command (AFRICOM) in Germany and appreciated AFRICOM's embrace of "the comprehensive approach" in addressing challenges in Africa. Witschel said that Germany fully understood that in order to carry out this approach, AFRICOM had to be staffed with non-DOD USG civilians from a variety of different agencies. Witschel said that the German government's only concern was that these non-DOD civilians have "clear legal status" under the NATO SOFA that will be readily recognized by state and local authorities in case they were involved in an accident or some other legal problem.

[1](#)3. (C) Witschel said that Germany agreed that giving non-DOD civilians dual appointments at DOD would clearly bring them under the provisions of the NATO SOFA. He suggested, therefore, that the best way to ensure that all non-DOD civilians assigned to AFRICOM (as well as EUCOM) enjoy SOFA status, at least in the short term, is for the USG to give them dual appointments. If the USG did not want to rely on dual appointments as a permanent solution, Witschel indicated that the German government was willing to negotiate a bilateral agreement with the United States to provide the necessary SOFA coverage. Witschel thought the agreement could be negotiated in three to four months and because of its "technical nature," he did not expect it would have difficulty getting the necessary approval from the Bundestag, even during the run-up to parliamentary elections in

September 2009. In response to Dell'Orto's question about whether Germany was open to non-DOD civilians receiving the same privileges and protections as members of the civilian component in the SOFA, Witschel responded positively. Witschel also acknowledged that the agreement would ideally cover non-DOD USG civilians at all U.S. military commands, not just AFRICOM.

14. (C) Dell'Orto inquired about Germany's current position regarding the status of non-DOD civilians at EUCOM and other commands whom the German MFA over the years has agreed to recognize as enjoying SOFA status via an exchange of diplomatic notes. While Witschel did not indicate that the MFA was invalidating those notes, he said he was concerned that German state and local authorities might not recognize the notes as providing definitive determination of entitlement to SOFA status and could reach their own conclusions. When Dell'Orto asked whether the USG personnel covered by diplomatic note could therefore be in legal jeopardy, Witschel confirmed that this was his fear.

15. (U) Comment: According to U.S. Embassy records, an exchange of notes provides SOFA coverage for the following non-DOD USG civilian positions in Germany: 1) up to 25 General Service Administration (GSA) personnel responsible for managing the fleet of DOD non-combat vehicles, 2) four to five Department of Veterans Affairs personnel at the U.S. Army Europe Regional Medical Command, 3) one USAID representative at EUCOM, 4) the Associate Director for International Liaison (State Department) at the Marshall Center for Security Studies, and 5) the six-member Joint Interagency Coordination Group (now known as the Command

Interagency Engagement Group or CIEG) at EUCOM (four Department of Justice, one Treasury and State Department). See Ref A for further background and reporting on this issue. End Comment.

VISITING MILITARY FORCES FROM NON-NATO OR NON-PFP COUNTRIES

16. (C) Witschel said that while the German government was "not against" the U.S. bringing in foreign military forces from non-NATO or non-Partnership for Peace (PfP) countries for training exercises, it wanted to make sure there was clear legal framework to cover these visits since the NATO or PfP SOFAs did not apply. Witschel noted that under international law, visiting military units of a sovereign country automatically enjoy certain privileges and immunities. Witschel said one way to deal with this issue, in the short term, is to require the visiting country to waive its sovereign immunity so that its soldiers are subject to German law. Witschel said the problem is that this then requires the visiting soldiers to apply for and receive visas, which could prove to be administratively burdensome for the visiting nation. A second way to address the issue, according to Witschel, would be for the U.S., as the inviting nation, to accept all financial liabilities for the visiting forces. Witschel said the problem here is that even if the U.S. were willing to do this, it would not cover criminal liability.

17. (C) Witschel said the German preference for addressing this matter was for each of the non-NATO/non-PfP countries who regularly send larger groups of soldiers for training exercises (primarily Iraq and Afghanistan) to negotiate a bilateral visiting forces agreement with Germany. Witschel asked for U.S. assistance in encouraging the applicable non-NATO/non-PfP countries to take this step. Witschel pointed out that such visiting forces agreements could provide that the visiting soldiers are allowed to bring their weapons, come without visas and enjoy applicable privileges and immunities, while ensuring that liability issues are put on a firm legal basis.

CLUSTER MUNITIONS

18. (C) Witschel raised concerns that the negotiations in

Geneva on cluster munitions under the framework of the Convention on Certain Conventional Weapons (CCW) not reach a result that runs contrary to the Oslo Convention, scheduled to be signed in December. He referred specifically to article 4 in the draft CCW protocol (which provides for the prohibition of certain categories of cluster munitions -- ref B) as posing the greatest potential conflict. Witschel recalled that on May 29, immediately after the Dublin agreement on banning cluster munitions, Germany had unilaterally renounced with immediate effect all use of cluster munitions and committed to destroy its existing stockpile as soon as possible. Witschel said Germany was committed to signing the Oslo Convention in December and appealed for "finding a middle ground" in the draft CCW protocol so that there was no contradiction between the two.

SOVEREIGN IMMUNITY FOR DOD-CHARTERED VESSELS

¶9. (C) Dell'Orto reviewed U.S. concerns about Germany's refusal in June 2008 to acknowledge the sovereign immune status of the MV VIRGINIAN, a U.S.-flagged vessel chartered by the Military Sealift Command (MSC), when it came into a German port to off-load and on-load U.S. military ammunition.

Dell'Orto said it was his understanding that such vessels had traditionally enjoyed sovereign immunity in German ports and asked whether there had been a change in policy or interpretation of law. He noted that the MV VIRGINIAN was being used by the MSC on an exclusive, long-term contract, so this was for all practical purposes, a USG vessel.

¶10. (C) MOD Legal Advisor Dieter Weingartner and Witschel denied there had been any change in policy and argued that under Article 32 of the UN Law of the Sea Convention, sovereign immunity applies only to "warships" and other "government ships," not to commercial vessels. Witschel claimed it was important to interpret this strictly because some countries, like Cuba, regularly asserted that their commercial vessels were state ships in an attempt to keep them from being boarded and inspected (presumably in order to

facilitate trafficking and other illegal activities). Witschel said that from the German point of view, the fact that a ship is carrying official U.S. government material does not make the vessel eligible for sovereign immunity. However, he suggested that one way to provide the privileges and immunities the U.S. wanted for these chartered vessels was through Article 72 of the Supplementary Agreement to the NATO SOFA, which provides for the extension of status to designated non-German commercial enterprises. Dell'Orto welcomed the German effort to meet U.S. concerns and said he looked forward to further discussions on this issue.

¶11. (U) Mr. Dell'Orto reviewed and cleared this cable.
KOENIG